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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Video Description
of Video Programming

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MM Docket No. 99-339 /

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**RESPONSE TO OPPOSITIONS TO
PETITION FOR RECONSIDERATION OF DIRECTV, INC.**

DIRECTV, Inc. ("DIRECTV")¹ hereby submits its response to oppositions to its petition for reconsideration of the Commission's Video Description Report and Order (the "Order").²

I. INTRODUCTION & SUMMARY

Throughout this proceeding, DIRECTV and various other parties have highlighted serious questions as to the Commission's authority to promulgate rules mandating video description pursuant to Section 713(f) of the Communications Act, or pursuant to its establishment clause³ and ancillary authority under Sections 4(i) and 303(r).⁴ In addition, several parties have made convincing arguments that any authority conferred by Section 713(f) must be

¹ DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and a wholly-owned subsidiary of Hughes Electronics Corporation.

² *In the Matter of Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Report and Order (rel. Aug. 7, 2000).

³ 47 U.S.C. § 151.

⁴ 47 U.S.C. §§ 154(i), 303(r).

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construed narrowly so as to avoid inevitable conflicts with the First Amendment.⁵ The Commission's Order adopting video description rules fail to adequately address these issues.

In adopting the new video description framework, the Commission has not only disregarded fundamental statutory and constitutional questions, it has also ignored several important factual issues raised in the record. The Commission adopted its proposed rules despite evidence that visually impaired audiences neither need nor want the type of service that the Commission has mandated.⁶ The Commission also imposed the burdens of video description on multichannel video programming distributors ("MVPDs"), such as DBS operators, using overly simplistic calculations of these providers' ability to bear such costs. Finally, the Commission concluded that its rules will have no appreciable effect on services designed for Spanish-speaking audiences, even though many commenters explained that requiring video description programming by regulatory fiat will affirmatively *displace* Spanish-language programming on the Secondary Audio Program ("SAP") channel.

Based on the substantial opposition expressed in the petitions for reconsideration and in comments in support thereof, DIRECTV urges the Commission to reconsider and vacate its video description rules.

II. THE COMMISSION LACKS AUTHORITY TO MANDATE VIDEO DESCRIPTION OF VIDEO PROGRAMMING

Overwhelmingly, the parties (and at least two Commissioners) agree that Section 713(f) of the Communications Act is an insufficient statutory basis upon which to impose mandatory

⁵ See, e.g., Comments of A&E Television Networks at 6-7; Comments of the National Association of Broadcasters at 2-4; Comments of the Motion Picture Association of America at 3-4; Comments of the National Cable Television Association at 4; Petition for Reconsideration of the National Cable Television Association at 6-7.

⁶ Comments of the National Federation of the Blind at 2.

video description on broadcasters and MVPDs.⁷ They agree that the text and intent of Section 713(f) was to require the Commission to gather more information so that Congress could better assess whether to impose a video description requirement. By deleting earlier references to implementation measures for video description, and by providing a clear mandate in the closed captioning provision, Congress left no room for the Commission to infer authority to require broadcasters and MVPDs to incur the substantial expense necessary for the provision of video description.⁸

Implicitly acknowledging that Section 713(f) provides no express authority for the implementation of a mandatory video description regime, the Commission instead inferred authority from Sections 1, 4(i), and 303(r) of the Communications Act. However, DIRECTV and other parties have observed that while the Commission may invoke ancillary authority under these provisions to further specific statutory responsibilities, it may not rely upon them to create regulatory requirements out of whole cloth for which it has no underlying authority.⁹

⁷ See, e.g., EchoStar Satellite Corporation, Petition for Reconsideration at 2-8; Motion Picture Association of America, Petition for Reconsideration at 3-7; National Cable Television Association Petition for Reconsideration at 2-7; National Association of Broadcasters, Petition for Partial Reconsideration and Clarification at 8-11; Comments of A&E Television Networks at 3-7; Statement of Commissioner Michael K. Powell at 1-3; Statement of Commissioner Harold W. Furchtgott-Roth at 1-2.

⁸ *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

⁹ See, e.g., DIRECTV, Petition for Reconsideration at 5-6; A&E Television Networks, Petition for Reconsideration at 6-7; EchoStar Satellite Corporation, Petition for Reconsideration at 5-7; National Association of Broadcasters, Petition for Reconsideration at 8-9; Motion Picture Association of America, Petition for Reconsideration at 5-7.

The parties opposing reconsideration fail to address these compelling arguments, and instead rely solely on the Commission's assessment of its own authority to adopt *rules*, even though Congress mandated only a *study*.¹⁰ DIRECTV therefore urges the Commission to reexamine Section 713(f) and its jurisdictional basis for imposing video description rules on broadcasters and MVPDs.

III. THE VIDEO DESCRIPTION RULES IGNORE IMPORTANT CONCERNS RAISED BY SEVERAL COMMENTERS

In addition to being outside the Commission's statutory authority, the Order also fails to address many of the issues raised by commenters during the proceeding and echoed by Commissioners in their separate statements.¹¹ Fundamental principles of administrative law require that agency action be "based on a consideration of the relevant factors,"¹² and rest on decisionmaking in which the agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."¹³

As discussed in greater detail below, DIRECTV believes that the Commission has failed to consider: (i) disputes concerning the desirability of video description of prime-time programming for visually-impaired consumers; (ii) DBS operators' ability to bear costs of video description; and (iii) use of the SAP channel for Spanish-language programming and First

¹⁰ National Television Video Access Coalition's Consolidated Opposition to Petitions for Reconsideration at 3; Media Access Group and WGBH Educational Foundation, Statement of Partial Opposition and Partial Agreement to Petitions for Reconsideration at 2.

¹¹ Statement of Commissioner Michael K. Powell at 6-8; Statement of Commissioner Harold W. Furchtgott-Roth at 2-3.

¹² *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

¹³ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Amendment implications. The Commission's failure to adequately address these important issues warrants reconsideration of the video description rules.

A. There Remains Serious Disagreement As To Whether The Proposed Rules Address The Real Needs of Visually-Impaired Consumers

The record upon which the Commission has adopted mandatory video description demonstrates much ambivalence on the part of the intended beneficiaries of this service. From the beginning, the National Federation for the Blind ("NFB") opposed the Commission's proposals as failing to address more important needs of visually-impaired individuals.¹⁴ The NFB also has asked the Commission to reconsider its rules on these grounds.¹⁵ In addition, many advocates of video description criticized the proposals as not going far enough.¹⁶ While more than four years have passed since Congress directed the Commission to study video description, consensus among its advocates remains elusive. In the absence of greater consensus on these fundamental issues, it is premature for the Commission to mandate services that will subject broadcasters and MVPDs to tremendous financial burdens. Indeed, that is why Congress required the Commission to *study* the issue, and took no further action upon receiving the Commission's reports. Given the divergent positions taken even by the intended beneficiaries of the video description rules and the financial burdens the rules impose, DIRECTV urges the Commission to reconsider and vacate its video description rules.

¹⁴ Comments of the National Federation of the Blind at 1.

¹⁵ National Federation of the Blind, Petition for Reconsideration at 2-6.

¹⁶ See Reply Comments of DIRECTV at 5 (critiquing extreme positions advanced by certain parties).

B. The Cost Analysis Upon Which The Commission Has Based Its New Rules Is Fundamentally Flawed

One of the most critical flaws in the Commission's rationale for mandating video description lies in its analysis of the ability of DBS operators to bear the costs imposed by the new rules. In response to DIRECTV's estimation that video description, as contemplated in the Notice, would cost tens of millions of dollars, the Commission concluded in cursory fashion that cost is not or should not be an issue.¹⁷ This outrageous conclusion is based not on publicly available financial information concerning DIRECTV's operating expenses and revenues, or any other specific information about DIRECTV's costs, but on a rough estimate calculated simply by multiplying the number of DIRECTV subscribers by the "average" price of a programming package. The Commission thus concluded that DIRECTV takes in over \$250 million per month, and that an expense of tens of millions of dollars would be comparatively insubstantial.

Regulatory decisionmaking that imposes costs of this magnitude should be buttressed by a cogent analysis of the facts found.¹⁸ The Commission's decision to impose mandatory video description on DBS operators based on fundamentally flawed data fails to satisfy this standard. As Commissioner Powell observed in his dissent, gross revenues should not be the benchmark of a DBS operator's ability to bear the expenses associated with the video description rules.¹⁹ Indeed, both DIRECTV and EchoStar note that DBS systems are extremely expensive to launch and operate: neither DIRECTV nor EchoStar have yet recovered their respective investments in the service. Moreover, as EchoStar notes in its own petition for reconsideration, video description would require approximately 6.25% of a channel of incremental bandwidth – a

¹⁷ Notably, the Commission did not find fault with DIRECTV's estimate of such costs.

¹⁸ *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484 (D.C. Cir. 1995).

¹⁹ Statement of Commissioner Michael K. Powell at 8.

bandwidth loss even greater than the 4% set-aside for public interest programming, which was expressly authorized by statute.²⁰

Because the Commission failed to adequately consider DBS operators ability to bear the onerous financial and technological burdens video description would impose, the Commission should reconsider and vacate its decision to subject DBS operators to mandatory video description.

C. The Video Description Rules Violate The First Amendment And Disenfranchise Consumers Who Rely Upon Spanish-Language Translations

DIRECTV and other petitioners and commenters agree that the Commission has failed to address the effects that mandatory video description will have on services currently provided using the SAP channel, in particular, its effects on the availability of Spanish language translations. Indeed, unless DIRECTV modifies its DBS system to provide a third audio program channel, video description will displace currently offered and planned Spanish-language programming.²¹ This displacement is of utmost concern to DIRECTV, which has sought to increase offerings for this historically underserved segment of the population. Petitioners and commenters have echoed this concern and have agreed with DIRECTV that the rules compel certain types of speech and place impermissible constraints on other types of speech. While many commenters throughout the proceeding explained that the SAP is often already utilized for Spanish language programming, the Commission simply concluded that a video description requirement of 50 hours per quarter “avoided any conflicts between competing uses of the SAP channel.”²² This conclusion fails to address the facts set forth in the record.

²⁰ EchoStar, Petition for Reconsideration at 9.

²¹ Comments of DIRECTV at 14-15; Reply Comments of DIRECTV at 7-8.

²² Order at ¶ 34.

Despite the fact that the service it has ordered will in many cases displace Spanish language translations, the Commission has also concluded that its rules avoid conflicts with the First Amendment. The Commission concludes that the rules are content-neutral, and that it may impose reasonable time, place and manner restrictions.²³ As several petitioners explain, this conclusion also is unsupported. Video description, as contemplated in the Order, requires that new content be created and added to an existing program. When the speaker originally utilized the SAP channel for Spanish language translation or other services, the rules force the speaker to remove this service in order to comply with the video description rules. For these reasons, such a rule simply does not qualify as a reasonable, content-neutral restriction.

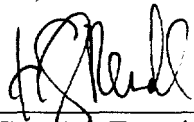
IV. CONCLUSION

Overwhelmingly, commenters and petitioners agree that the Commission lacks authority to impose mandatory video description and that the Commission has failed to address pertinent policy arguments raised during the proceeding. While DIRECTV continues to support the goal of making its programming available to as many subscribers as possible, regardless of physical impairment, DIRECTV believes that the rules the Commission has adopted are ill-advised. DIRECTV therefore urges the Commission to reconsider its authority to promulgate these rules, or, in the alternative, to modify its video description framework in accordance with the comments set forth in greater detail in DIRECTV's petition for reconsideration.

²³ *Id.* at ¶ 64.

Respectfully submitted,

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November 27, 2000

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CERTIFICATE OF SERVICE

I, Kimberly S. Reindl, hereby certify that on this 27th day of November 2000, a true and correct copy of the foregoing "Response to Oppositions to Petition for Reconsideration of DIRECTV, Inc." was served via U.S. First Class Mail, postage prepaid, on the following parties:

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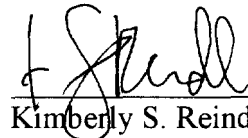
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